

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2007-215-C - ORDER NO. 2007-683  
OCTOBER 5, 2007

IN RE: Petition of Sprint Communications Company     ) ORDER RULING ON  
L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS     ) ARBITRATION  
for Arbitration of Rates, Terms, and Conditions     )  
of Interconnection with BellSouth     )  
Telecommunications, Inc. d/b/a AT&T South     )  
Carolina d/b/a AT&T Southeast     )

**I. PROCEDURAL BACKGROUND**

This matter comes before the Public Service Commission of South Carolina (“the Commission”) on a Petition for Arbitration (“Petition”) filed by Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS (“Sprint”) pursuant to Section 252 of the federal Telecommunications Act of 1996. Sprint filed its Petition with the Commission on May 29, 2007. BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast (“AT&T South Carolina”) filed its Motion to Dismiss and, in the Alternative, Answer (“Motion/Answer”) on June 22, 2007, and Sprint filed its Response to the Motion/Answer on July 2, 2007. The Commission held AT&T South Carolina’s Motion to Dismiss in abeyance and ordered the parties to proceed with the

hearing on the merits of the case “in order to make a fully reasoned determination in this case.”<sup>1</sup>

The Evidentiary Hearing in this matter was held on August 20, 2007. Sprint was represented by J. Jeffrey Pascoe, Esquire, William R.L. Atkinson, Esquire, and Joseph M. Chiarelli, Esquire. AT&T South Carolina was represented by Patrick W. Turner, Esquire and John T. Tyler, Esquire. The Office of Regulatory Staff (“ORS”) was represented by Shannon B. Hudson, Esquire. Sprint presented the testimony of Mark G. Felton. AT&T South Carolina presented the testimony of J. Scott McPhee and P.L. (Scot) Ferguson. ORS did not present a witness during the hearing. The Commission gave the Parties the opportunity to submit Post-Hearing Briefs and Proposed Orders. We have carefully reviewed these submissions, the evidence of record, and the controlling law, and this Order sets forth our rulings on AT&T South Carolina’s Motion to Dismiss, the issue Sprint presented in its Petition, and the issue AT&T South Carolina presented in its Motion/Answer.

## **II. LEGAL STANDARDS UNDER THE FEDERAL TELECOMMUNICATIONS ACT OF 1996**

Sections 251 and 252 of the federal Act encourage negotiations between Parties to reach local interconnection agreements. Section 252(a) of the federal Act requires incumbent local exchange carriers (“ILECs”) to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c) (2)-(6). As part of the negotiation process, the 1996 Act allows a party to petition a state

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<sup>1</sup> See Order Holding Motion to Dismiss in Abeyance, Order No. 2007-579 in Docket No. 2007-215-C (August 14, 2007).

commission for arbitration of unresolved issues.<sup>2</sup> The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.<sup>3</sup> The petitioning party must submit along with its petition “all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the Parties with respect to those issues; and (3) any other issues discussed and resolved by the Parties.”<sup>4</sup> A non-petitioning party to a negotiation under this section may respond to the other party’s petition and provide such additional information as it wishes within 25 days after the commission receives the petition.<sup>5</sup> The 1996 Act limits a state commission’s consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.<sup>6</sup>

### III. FACTUAL BACKGROUND

Sprint and AT&T South Carolina currently operate under an interconnection agreement that became effective in 2001.<sup>7</sup> The initial, fixed term of the 2001 agreement expired December 31, 2004.<sup>8</sup> In 2004, Sprint and AT&T South Carolina began actively negotiating provisions of a subsequent interconnection agreement that would govern their operations in South Carolina on a going-forward basis.<sup>9</sup> During these negotiations, the parties have continued operating under the 2001 agreement on a month-to-month basis in

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<sup>2</sup> 47 U.S.C. § 252(b)(2)

<sup>3</sup> *See generally*, 47 U.S.C. §§ 252 (b) (2) (A) and 252 (b) (4).

<sup>4</sup> 47 U.S.C. § 252 (b) (2).

<sup>5</sup> 47 U.S.C. § 252 (b) (3).

<sup>6</sup> 47 U.S.C. § 252 (b) (4).

<sup>7</sup> Tr. at 94-96.

<sup>8</sup> Tr. at 67; Tr. at 94; Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).

<sup>9</sup> Tr. at 28 (page 6 of Sprint Direct); Tr. at 96.

order to avoid disruption of service to Sprint's end user customers.<sup>10</sup> On December 14, 2006, the parties reached a tentative settlement that each agreed was "a milestone," and the parties agreed that "final settlement is likely in the next few weeks."<sup>11</sup>

The parties, however, did not execute a new agreement. Shortly after the parties reached this tentative settlement, the Federal Communications Commission ("FCC") adopted and approved various Merger Commitments in its BellSouth/AT&T "Merger Order."<sup>12</sup> One of those Merger Commitments provides, in relevant part:

[AT&T South Carolina] shall permit [Sprint] to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years . . . .<sup>13</sup>

Relying on its interpretation of this Merger Commitment, Sprint stopped working on finalizing contract language consistent with the parties' negotiations and, instead, began pursuing an extension of the 2001 agreement.<sup>14</sup>

Sprint contends that this Merger Commitment allows it to extend the 2001 agreement three years from either March 20, 2007 (the date of its request for an extension) or from December 29, 2006 (the date of AT&T's letter to the FCC setting forth the commitment).<sup>15</sup> AT&T South Carolina agrees that the Merger Commitment allows Sprint to extend the 2001 agreement for three years, but AT&T South Carolina

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<sup>10</sup> Tr. at 78-79; Tr. at 81; Tr. at 95-96; Composite Hearing Exhibit 2 (PLF-3 at page 1 of 2).

<sup>11</sup> Hearing Exhibit 4.

<sup>12</sup> Memorandum Opinion and Order, *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007) ("Merger Order").

<sup>13</sup> See Hearing Exhibit 3 at p. 3, Item 4.

<sup>14</sup> Tr. at 112-113.

<sup>15</sup> Tr. at 35-36 (Sprint direct at 13-14).

believes the extension begins when the initial term of the 2001 agreement expired on December 31, 2004. In other words, the parties disagree about when the parties will stop operating under the 2001 agreement and start operating under a new agreement in South Carolina.<sup>16</sup>

Accordingly, Sprint filed its Petition for Arbitration (“Petition”) “[p]ursuant to Section 252(b) of the Telecommunications Act of 1996.”<sup>17</sup> Sprint’s Petition presents the sole issue of whether Sprint can extend the 2001 agreement for three years “from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4.”<sup>18</sup> AT&T South Carolina filed a Motion to Dismiss and, in the Alternative, Answer, challenging Sprint’s ability to present its issue in this Section 252 proceeding and presenting AT&T South Carolina’s issue of whether the Commission should require Sprint to execute the agreement AT&T South Carolina has submitted for the Commission’s consideration.<sup>19</sup>

#### **IV. DECISION ON AT&T SOUTH CAROLINA’S MOTION TO DISMISS AND ON SPRINT’S ISSUE**

In its Motion to Dismiss, AT&T argued that since the source of Sprint’s requested three-year extension was a Merger Commitment, Sprint is asking for an “interpretation of a merger commitment” that is not a Section 251 “open issue” subject to arbitration, and further, that the FCC has “the sole authority to interpret, clarify, or enforce any issue involving merger conditions set forth in its Merger Order.”<sup>20</sup> We disagree. The Commission has subject-matter jurisdiction to resolve disputes regarding contract terms

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<sup>16</sup> See, e.g., Tr. at 6; Tr. at 67.

<sup>17</sup> See Petition at p. 1.

<sup>18</sup> Id. at p. 8.

<sup>19</sup> See Motion/Answer at ¶28 to end.

<sup>20</sup> AT&T Motion, at unnumbered p. 3.

pertaining to the length of an interconnection agreement, and to implement such contract terms pursuant to Section 252(b)(4)(c), and 252(c)(1) and (3) of the Act, as well as S.C. Code Ann. Section 58-9-280(C)(1) (Supp. 2006). We find the case law on this point cited in Sprint's pleadings to be most persuasive, particularly the 2002 11<sup>th</sup> Circuit opinion in which the Court clearly stated that a state commission's broad authority under Section 252(b)(4)(C) permits it to arbitrate 251-related implementation disputes that are not specifically listed in Section 251 of the Act.<sup>21</sup> In the *MCI* case, the Florida Public Service Commission originally found that it did not have jurisdiction to arbitrate disputes over enforcement provisions and liquidated damages because those matters were not specifically included in Section 251 as subjects of arbitration. The 11<sup>th</sup> Circuit disagreed with this restricted view of state commission jurisdiction over interconnection arbitrations, and found that the Florida Commission had jurisdiction under 252(b)(4)(C) to arbitrate any provision that is "within the realm of 'conditions . . . required to implement' the agreement."<sup>22</sup>

In addition to the extensive federal case law cited by Sprint in this docket for the proposition that the FCC has consistently acknowledged its adoption of merger conditions does not limit state authority to impose or enforce interconnection-specific requirements,<sup>23</sup> the FCC's AT&T Merger Order itself expressly recognized that the Merger Commitments did not in any way:

"...restrict, supersede, or otherwise alter state or local jurisdiction under ... the Act ... or over the matters addressed in these commitments, or to

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<sup>21</sup> *MCI v. BellSouth*, 298 F.3d 1269 (11<sup>th</sup> Cir. 2002).

<sup>22</sup> *Id.* at 1274.

<sup>23</sup> Sprint Response, pages 9-13.

limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.”<sup>24</sup>

Accordingly, as Sprint observed in its post-hearing Brief, at 4, 26-28, just as this Commission had jurisdiction to resolve disputes regarding contract terms pertaining to the length and commencement of an interconnection agreement *before* the AT&T/BellSouth merger, nothing in the FCC’s Merger Order altered this Commission’s jurisdiction to resolve any Merger Commitment interconnection-related dispute *after* the merger occurred.

Finally, we find the testimony of AT&T’s witness Mr. McPhee to be fundamentally inconsistent with AT&T’s position that the FCC has exclusive jurisdiction over the AT&T Merger Commitments. When asked during the hearing, in connection with AT&T’s merger-related “transit” Merger Commitment, whether the Commission would have jurisdiction to arbitrate transit service pricing if the parties had negotiated transit rates, the AT&T witness responded that this Commission would have jurisdiction to arbitrate transit rates.<sup>25</sup> Either the FCC has exclusive jurisdiction over the Merger Commitments or it does not, and AT&T’s own witness conceded during the hearing that state commissions would have jurisdiction over a given AT&T Merger Commitment under certain circumstances.

For the foregoing reasons, the Commission denies AT&T’s Motion to Dismiss. However, even though we hold that we have concurrent jurisdiction to decide the issue

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<sup>24</sup> FCC Order, APPENDIX F at page 147.

<sup>25</sup> Tr. at 164-65.

before us for arbitration, we decline to do so, since we believe that the FCC is the entity that should more appropriately rule on it in this instance.

FCC Orders that address Section 251 requirements typically provide over-arching guidance that State commissions apply in order to reach state-by-state (and often, within a state, carrier-by-carrier) decisions on matters such as “impairment” and the appropriate rates for interconnection and unbundled network elements. In sharp contrast, the *Merger Order* does not address Section 251 requirements, and it does not provide over-arching guidance to be applied by the states. Instead, the *Merger Order* adopts specific “conditions and commitments” that are “enforceable by the FCC . . . .”<sup>26</sup>

We can discern no legal or policy reason that one of these specific conditions and commitments should be interpreted to mean one thing in one state and other things in other states. To the contrary, Sprint’s position during the hearing was that carriers “want to keep a regional agreement” and that “in reality, carriers want that uniformity.”<sup>27</sup> Sprint further explained its position that carriers “want to operate under one agreement” and that “in Sprint’s experience, that’s what happens.”<sup>28</sup> We find that the uniformity that Sprint (as well as AT&T South Carolina) seeks can best be achieved by having Sprint present its issue to the FCC.

Additionally, Sprint stated its position that “you can say there was a quid pro quo of sorts exchanged between the FCC and AT&T, in return for AT&T’s merger

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<sup>26</sup> *Merger Order* (Appendix F), p. 147 (emphases added).

<sup>27</sup> Tr. at 186.

<sup>28</sup> *Id.* at 186-187.



commitments.”<sup>29</sup> Given that it was the FCC, and not this Commission, that was a party to any such “exchange,” we find that judicial economy, uniformity, and certainty all are best served by letting the FCC provide any necessary clarification or interpretation of what was involved in this exchange (if Sprint chooses to ask the FCC to do so).

Finally, Sprint has expressed concern that if it asks the FCC to interpret and enforce the Merger Commitment, the FCC might rule that the State commissions should do so instead.<sup>30</sup> We believe that such a ruling is highly unlikely in light of the FCC’s clear pronouncement that “all conditions and commitments proposed in this letter are enforceable by the FCC. . . .”<sup>31</sup>

In any event, we hold that, although this Commission has concurrent jurisdiction to decide this matter, Sprint may submit its issue with regard to the applicability of the Merger Commitment to the extension of the Sprint-AT&T 2001 interconnection agreement more appropriately to the FCC for a ruling.

## **V. AT&T’S PROPOSED ISSUE #2**

In the Answer portion of its Motion to Dismiss And, in the Alternative, Answer filed on June 22, AT&T also requested that the Commission require the Parties to adopt a “new” interconnection agreement based partially on the Parties’ incomplete negotiations conducted prior to the AT&T/BellSouth merger, and partially on AT&T’s latest “generic” Attachments 3A and 3B pertaining to “Network Interconnection” terms and

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<sup>29</sup> Tr. at 8.

<sup>30</sup> See Tr. at 185.

<sup>31</sup> *Merger Order* (Appendix F), p. 147.

conditions.<sup>32</sup> In its July 2 Response, Sprint requests that the Commission reject Issue 2 from consideration because AT&T has in effect already conceded that the Parties' existing agreement can be extended, and because Sprint and AT&T never discussed in their negotiations the Attachment 3 documents that AT&T would have us adopt as part and parcel of a "new" agreement.<sup>33</sup> We hold that the parties are free to submit this issue to the FCC along with the main issue in this case.

## **VI. CONCLUSION**

Based on the foregoing, it is hereby ordered that:

1. AT&T South Carolina's Motion to Dismiss Sprint's issue is denied.
2. Although the Public Service Commission of South Carolina has concurrent jurisdiction with the FCC to make a decision on Sprint's issue, this Commission declines to rule, and Sprint may present its issue to the FCC for a ruling.
3. The parties are also free to submit AT&T's Issue #2 to the FCC for a ruling.

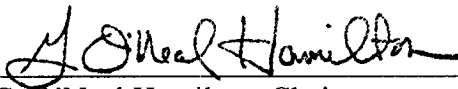
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<sup>32</sup> *Id.* at unnumbered p. 10-12.

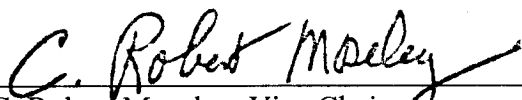
<sup>33</sup> Sprint Response, pages 17-18.

4. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
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G. O'Neal Hamilton, Chairman

ATTEST:

  
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C. Robert Moseley, Vice Chairman

(SEAL)